Public Prosecutor v Saiful Afikin bin Mohd Firus

HIGH COURT (KOTA BHARU) — CRIMINAL APPEAL (JUVENILE) NO 41-32-1995
NIK HASHIM JC
29 FEBRUARY 1996

Criminal Procedure *— Juvenile — Sentencing of — Probation order — Whether probation order can be made in homicide case — Penal Code (FMS Cap 45) s 304 — Juvenile Courts Act 1947 s 21(1)*

Criminal Procedure *— Juvenile — Sentencing of — Compensation order — Whether order of compensation valid where guardian not given an opportunity to be heard — Juvenile Courts Act 1947 s 13*

Criminal Procedure *— Juvenile — Sentencing of — Imprisonment — Whether order to place offender under care of his parents appropriate in homicide case — Whether order of imprisonment appropriate — Whether end of justice suitably served if offender sent to an approved school instead of prison — Juvenile Courts Act 1947 ss 12(1)(d), (f) & 40*

A juvenile offender ('the offender') pleaded guilty to the charge of culpable homicide not amounting to murder under the first limb of s 304 of the Penal Code (FMS Cap 45) ('the Code'). At the time of committing the offence, the offender was 16 years old. The juvenile court imposed the following orders against him, that:

(i) the offender be placed under the care of his parents for a period of two years under s 12(1)(d) of the Juvenile Courts Act 1947 ('the Act');

(ii) the offender be placed under a probation order for two years under s 21(1) of the Act; and

(iii) the guardian of the offender to pay RM1,500 to the deceased's parents as compensation.

The Public Prosecutor appealed against the orders contending that the orders were unsuitable to the offence charged and should be substituted with a more appropriate order to reflect the seriousness of the offence.

Held, quashing the orders made by the juvenile court and ordering that the offender be committed to the Henry Gurney School:

(1) The probation order cannot be made in homicide cases according to s 21(1) of the Act. The offence under appeal is a clear-cut homicide case under the first limb of s 304 of the Code. Therefore, the order imposed under (ii) aforesaid, placing the offender under probation, was wrongly made and must be set aside (see pp 312I, 313A–B).

(2) With regard to the order of compensation under (iii), s 13 of the Act stipulates that an opportunity to be heard must be given to the parent or guardian before an order of compensation is made against him. However, the records do not show that such an opportunity was given to the mother of the offender who was present in court at the time of the hearing. Therefore, in the absence of any inquiry as regards her ability to pay, the juvenile court fell into a serious error when it made the order of compensation against her. Such an irregularity renders a failure of justice which cannot be cured and makes the order invalid. Therefore, order (iii) must also be set aside (see p 313E–F).

(3) At the material time, the offender was a young person and he was a first offender. Therefore, a sentence of imprisonment was not appropriate and not called for. On the other hand, the order made under s 12(1)(d) to place the offender under the care of his parents was also not suitable and commensurate with the facts and the offence charged as the offence was very serious and the offender should be seriously dealt with. The end of justice would suitably be served if the offender were sent to an advanced approved school rather than to prison. Therefore, the order made by the juvenile court should be quashed and replaced with the order that the offender be committed to the Henry Gurney School until he attained the age of 21 under ss 12(1)(f) and 40 of the Act (see pp 314H–I, 315C–D; *Tukiran bin Taib v PP* [1955] MLJ 24 followed).

[Bahasa Malaysia summary

Seorang pesalah juvana ('pesalah itu') mengaku bersalah terhadap pertuduhan homisid salah yang tidak berjumlah kepada pembunuhan di bawah cabang pertama s 304 Kanun Keseksaan (NMB Bab 45) ('Kanun itu'). Pada masa melakukan kesalahan itu, pesalah itu berumur 16 tahun. Mahkamah juvana mengenakan perintah-perintah berikut terhadapnya, iaitu bahawa:

(i) pesalah itu diletakkan di bawah jagaan ibu bapanya selama dua tahun di bawah s 12(1)(d) Akta Mahkamah Juvana 1947 ('Akta itu');

(ii) pesalah itu diletakkan di bawah perintah percubaan selama dua tahun di bawah s 21(1) Akta itu; dan

(iii) penjaga pesalan itu hendaklah membayar RM1,500 kepada ibu bapa si mati sebagai pampasan.

Pendakwa Raya merayu terhadap perintah-perintah itu. Dihujah bahawa perintah-perintah itu tidak sesuai terhadap kesalahan yang dipertuduh dan sepatutnya diganti dengan perintah yang lebih sesuai yang membayangkan bagaimana seriusnya kesalahan itu.

Diputuskan, membatalkan perintah-perintah yang dibuat oleh mahkamah juvana dan memerintahkan pesalah itu dihantar ke Sekolah Henry Gurney:

(1) Perintah percubaan itu tidak boleh dibuat di dalam kes homisid mengikut s 21(1) Akta itu. Kesalahan di bawah rayuan ini sememangnya adalah kes homisid di bawah cabang pertama s 304 Kanun itu. Maka, perintah yang dikenakan di bawah (ii) seperti di atas, iaitu meletakkan pesalah di bawah percubaan, telah dibuat dengan salah dan mesti diketepikan (lihat ms 312I, 313A–B).

(2) Berkaitan dengan perintah pampasan di bawah (iii), s 13 Akta itu mensyaratkan bahawa peluang didengar harus diberikan kepada ibu bapa atau penjaga sebelum perintah pampasan dibuat terhadapnya. Walau bagaimanapun, rekod tidak menunjukkan bahawa peluang sebegitu telah diberikan kepada ibu pesalah yang hadir di mahkamah semasa perbicaraan. Maka, dengan ketiadaan siasatan mengenai kebolehannya membayar, mahkamah juvana telah membuat kesilapan yang sangat besar apabila membuat perintah pampasan itu terhadapnya. Perkara yang di luar aturan itu adalah kegagalan keadilan yang tidak boleh dibaiki dan menjadikan perintah itu tidak sah. Maka, perintah (iii) itu mesti diketepikan juga (lihat ms 313E–F).

(3) Pada masa yang material, pesalah itu adalah orang muda dan beliau merupakan pesalah kali pertama. Maka, hukuman penjara tidak sesuai dan tidak perlu. Akan tetapi, perintah di bawah s 12(1)(d) untuk meletakkan pesalah di bawah jagaan ibu bapanya juga tidak sesuai dan sepadan dengan fakta-fakta dan kesalahan yang dipertuduhkan kerana kesalahan yang dipertuduh itu adalah sangat serius dan pesalah mesti dihukum dengan serius juga. Keadilan hanya dapat dicapai sekiranya pesalah dihantar ke sekolah yang diluluskan dan bukan dengan menghantarnya ke penjara. Maka, perintah yang dibuat oleh mahkamah juvana dibatalkan, dan digantikan dengan perintah bahawa pesalah dihantar ke Sekolah Henry Gurney sehingga dia mencapai umur 21 tahun mengikut ss 12(1)(f) dan 40 Akta itu (lihat ms 314H–I, 315C–D; *Tukiran bin Taib v PP* [1955] MLJ 24 diikut).]

Notes

For cases on sentencing of juveniles, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1647–1655.

Cases referred to

Ang Chin Sang v PP [1970] 2 MLJ 6
Tukiran bin Taib v PP [1955] MLJ 24
Muharam bin Anson v PP [1981] 1 MLJ 222

Legislation referred to

Penal Code (FMS Cap 45) ss 302, 304
Juvenile Courts Act 1947 ss 12(1)(d), (f), 13(3), (4), 15, 21(1), 40
Punishment for Vandalism Act 1966 s 3 [Sing]

Zameri bin Mat Nawang (Deputy Public Prosecutor) for the appellant.
Mohd Apandi Ali (*Apandi Ali & Co*) for the respondent.

Cur Adv Vult

Nik Hashim JC: This is an appeal by the Public Prosecutor against the orders made by the juvenile court.

The respondent, a juvenile, was originally charged with murder of one Ahmad Farid bin Mat Saleh @ Mohamad on 28 November 1992 under s 302 of the Penal Code (FMS Cap 45) ('the Code'). However, the charge was subsequently amended by the prosecution to that of culpable homicide not amounting to murder under the first limb of s 304 of the Code. The respondent pleaded guilty to the latter charge and the court made the following orders against him, that:

(i) the offender be placed under the care of his parents for a period of two years under s 12(1)(d) of the Juvenile Courts Act 1947 ('the Act');

(ii) the offender be placed under a probation order for two years under s 21(1) of the Act; and

(iii) the guardian of the offender to pay RM1,500 to the deceased's parents as compensation.

At the time of the offence, the offender was 16 years and one month old. He was born on 21 October 1976.

Briefly, the facts were that on 28 November 1992 at about 4pm, the offender met the deceased at Hankyu Supermaket, Kota Bharu. They set eyes on each other, and the offender became scared. The offender claimed that he was chased by the deceased and his friends. Fearing that the deceased might be going after his twin brother, who looked like him and was then in the town, the offender returned to the town and armed himself with a knife. On arrival at the bus stand near Kelantan Hotel, the offender was confronted by the deceased. They exchanged blows. In the course of the fight, the offender stabbed the deceased on the right neck with the knife. The deceased, who was then 19, died due to acute haemorrhagic shock. The offender threw away the knife in a well but it was recovered subsequently. The offender surrendered himself.

On going through the records, I find that the foregoing orders (ii) and (iii) are defective, in that they were made not in accordance with the provisions of the Act. It appears to me that the probation order cannot be made in homicide cases. Section 21(1) of the Act states:

> Where a juvenile court by or before which a juvenile is found guilty of *an offence other than homicide* is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the

A offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order. (Emphasis added.)

The offence under appeal is a clear-cut homicide case under s 304 of the Code. That being so, the order imposed under (ii) aforesaid, placing the offender under probation, was wrongly made and must be set aside.

B With regard to the order of compensation under (iii), the law stipulates that an opportunity to be heard must be given to the parent or guardian before an order of compensation is made against him. Section 13 of the Act provides:

(3) Where a court thinks that a charge against a juvenile is proved, the court C may make an order on the parent or guardian under this section *for the payment of compensation* or costs or requiring him to give security for the good behaviour of the juvenile, without proceeding to record a finding of guilt against the juvenile.

(4) An order under this section may be made against a parent or guardian who, having been required to attend, has failed to do so; but, save as D aforesaid, no such order shall be made without giving the parent or guardian *an opportunity to be heard.* (Emphasis added.)

The provisions are precise and unambiguous. They are there to be followed and complied with. However, the records do not show that such an opportunity was given. The offender's mother was present during the E proceedings. She was not examined, neither was she asked whether she was agreeable to pay the compensation. So, in the absence of any inquiry as regards her ability to pay, the juvenile court fell into a serious error when it made the order of compensation against her. In my view, such an irregularity renders a failure of justice which cannot be cured and makes the order invalid. Therefore, order (iii) must also be set aside.

F En Zameri bin Mat Nawang for the Public Prosecutor, in urging the court to substitute the order placing the offender under the care of his guardian under s 12(1)(d) with a more appropriate order in order to reflect the seriousness of the offence, submitted that the juvenile court had failed to take into account public interest in making the order. He cited the G Singapore case of *Ang Chin Sang v PP* [1970] 2 MLJ 6 in support of his contention. In that case, a boy under 16 years of age was convicted by a magistrates' court for an offence punishable under s 3 of the Punishment for Vandalism Act 1966 ('the Vandalism Act'), and was sentenced to three month's imprisonment and three strokes of the cane. The sentence was H affirmed on appeal.

Learned counsel for the respondent, En Mohd Apandi Ali, however, contended that the case was not relevant for consideration as there was no equivalent Act in Malaysia. The Vandalism Act is 'an Act to provide for exemplary punishment for acts of vandalism'.

I With respect, *Ang*'s case was cited by the learned deputy as an example to show that in suitable cases, even a boy under the age of 16 could be ordered to be imprisoned. However, that case was decided based on the law in Singapore. Unlike the Vandalism Act, the Juvenile Courts Act 1947 is an Act to provide for the care and protection of children and

young persons. On proof of an offence, the juvenile court shall, in addition to any other powers exercisable by virtue of the Act or any other law for the time being in force, have power under s 12(1):

(a) to admonish and discharge the offender;
(b) to discharge the offender upon his entering into a bond to be of good behaviour and to comply with such order as may be imposed;
(c) to commit the offender to the care of a relative or other fit person;
(d) to order his parent or guardian to execute a bond to exercise proper care and guardianship;
(e) without making any other order, or in addition to an order under paragraph (c) or (d), to make a probation order under s 21;
(f) to order the offender to be sent to an approved school or Henry Gurney School;
(g) to order the offender to pay a fine, compensation or costs; and
(h) where the offender is a young person and the offence is punishable with imprisonment the court may, subject to s 15(2), impose upon him any term of imprisonment which could be awarded by a sessions court, or, if the court considers that its powers are inadequate, commit him to the High Court for sentence.

There are, however, restrictions on punishment of children and young persons under the Act. Section 15 provides:

(1) No child shall be sentenced or ordered to be imprisoned for any offence or be committed to prison in default of payment of a fine, damages or costs.
(2) No young person shall be sentenced or ordered to be imprisoned *if he can be suitably dealt with in any other way* whether by probation, fine, or committed to a place of detention, approved school, or Henry Gurney School, or otherwise.
(3) A young person sentenced or ordered to be imprisoned shall not be allowed to associate with adult prisoners. (Emphasis added.)

The issue before the court now is whether the order placing the offender under the care of his parents under s 12(1)(d) is suitable in the circumstances of this case.

The offender was charged with an offence of culpable homicide not amounting to murder under the first limb of s 304 of the Code, which carries a punishment of imprisonment for a term which may extend to 20 years and shall also liable to fine. At the material time, the offender was a young person, being above 14 and under 18 years of age, and at the hearing of this appeal he was 19 years and 8 month's old. For the purpose of this appeal, the relevant age to be considered by the court is the age when the offender committed the offence and not the age at the time of the appeal. There can be not the smallest room for doubt that this offence is very serious indeed and the offender should be seriously dealt with. A valuable life was sacrificed at the hand of the offender. If not for his age, I would not hesitate to send him to imprisonment. In the circumstances of this case, I do not consider that a sentence of imprisonment is appropriate and called for. Bellamy J in *Tukiran bin Taib v PP* [1955] MLJ 24 at p 25 said:

> It has been stressed by this court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out of prison, if possible ... I consider that it would be more beneficial to the accused, and in the long run to the community at large, to send him to an advanced approved school rather than to prison ...

Though *Tukiran*'s case was decided 41 years ago, I consider it is still good law, and I would adopt the same approach in deciding the case under appeal. To my mind, the order under s 12(1)(d) is not suitable and commensurate with the facts and the offence charged. The offender had been detained for two years and nine days when he was charged for murder. I take that into consideration in assessing a suitable order against him (see *Muharam bin Anson v PP* [1981] 1 MLJ 222). The offender is also a first offender. The end of justice, in my view, would suitably be served if the offender were sent to an advanced approved school rather than to prison. I, therefore, quash the order made by the juvenile court, and order that the offender be committed to the Henry Gurney School until he attains the age of 21 under ss 12(1)(f) and 40 of the Act.

Order accordingly.

Reported by Azra Azman-Parry